Great Scot of Florida, Inc. *and* United Food and Commercial Workers International Union, Local 1636, AFL-CIO. Cases 12-CA-8824, 12-CA-8903, and 12-RC-5729

June 24, 1981

DECISION AND ORDER

On January 29, 1981, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Great Scot of Florida, Inc., Sarasota, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election in Case 12-RC-5729 be, and the same hereby is, set aside, and that Case 12-RC-5729 be dismissed.

[1] The Administrative Law Judge recommended that a bargaining order issue in this case as the most appropriate remedy for Respondent's unfair labor practices. Respondent has excepted to this recommendation and argues, *inter alia*, that the unit previously determined by the Regional Director is inappropriate for purposes of collective bargaining. Respondent maintains that, after the unit determination made in Case 12-RC-5729 and the Board's denial of review therein, the Board decided *Ashcraft's Market, Inc.*, 246 NLRB 471 (1979), and that *Ashcraft's* mandates a contrary conclusion regarding the scope of the unit here. Respondent therefore urges the Board to reconsider the unit determination in light of subsequent case law and to find appropriate a unit of all employees at Respondent's Sarasota retail store, rather than a unit comprised of grocery employees alone and excluding meat department employees.

Sec. 102.67(f) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides that denial of a request for review shall preclude relitigation of the representation issue in a related subsequent unfair labor practice proceeding. Nevertheless, to avoid any confusion our decision may have generated, we observe here that the considerations which prompted us to find appropriate an overall unit in *Ashcraft's* are not present in the case at hand.

In *Ashcraft's* the Board found that the meat department employees did not have a separate community of interest because their job functions did not require specialized skills. Two-thirds of the meat sold at the employer's facility was prepackaged and prepriced, and the only task involved was putting the product on the shelf; the remaining one-third was "boxed beef," which required only trimming and cutting into smaller pieces. The employer did not cut to order for its customers. In addition, all employees at Ashcraft's Market had uniform job and wage classifications, worked under the same supervision, and frequently interchanged jobs.

Here, Respondent's request for review indicated that, as in *Ashcraft's*, Respondent's meat department employees handle precut meat products, but that they also spend a substantial amount of time cutting, pricing, and packaging meat. Respondent maintains a meatcutter job classification, unlike the employer in *Ashcraft's*, and Respondent's meatcutters receive substantially higher wages than employees in other classifications. Meatcutters are hired off the street and are not transferred or promoted from other classifications within the store. They do not perform work in other areas of the store in addition to their duties as meatcutters nor, with the exception of the meat manager, are employees in other classifications required to perform the work of meatcutters. Moreover, Respondent employs a meat manager who, while not a supervisor, is in charge of ensuring the profitable operation of the meat departments and is capable of performing the same work as the meatcutters when necessary.

In addition to meatcutters and the meat manager, Respondent also assigns service clerks to the meat department to wrap and shelve meat products and assigns a courtesy clerk to clean the meat department at night. These employees also work in other parts of the store if necessary, and occasionally an employee whose primary duties lie elsewhere may be assigned as a service or courtesy clerk to the meat department.

Based on these factors, most of which were missing in *Ashcraft's*, the Regional Director found that the meat department employees have a separate community of interest from the other store employees, despite limited interchange among the clerks. *Ashcraft's* did not compel a different conclusion when both cases were simultaneously pending before the Board, and it does not compel a different conclusion now. Accordingly, we find the unit determined by the Regional Director in Case 12-RC-5729 to be appropriate for the purposes of collective bargaining, and we adopt the Administrative Law Judge's recommendation that a bargaining order issue to remedy Respondent's unfair labor practices.

We find that the Union made a demand for recognition received by Respondent on August 27, 1979, at which time it possessed valid authorization cards signed by a majority of Respondent's employees in the appropriate unit. We conclude that Respondent's obligation to bargain arose at that time, and we shall therefore date the bargaining order August 24, 1979. See *Trading Port, Inc.*, 219 NLRB 298 (1975).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate employees about their union activities and desires.

WE WILL NOT interrogate employees about complaints and advise employees to bring their complaints directly to management without need of a union.

WE WILL NOT threaten to cut the working hours of our employees if the Union becomes the employees' collective-baragining representative.

WE WILL NOT threaten to close or impliedly threaten to close our stores No. 620 and 630 if our employees select the Union as their collective-bargaining representative.

WE WILL NOT grant employees time and a half for pay for working on certain holidays and give them pay raises because the majority

of them voted against the Union in a Board-conducted election.

WE WILL NOT withhold those benefits from our meat department employees because a majority of those employees have not voted against the Union in a Board-conducted election.

WE WILL NOT refuse to bargain collectively with United Food and Commercial Workers International Union, Local 1636, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed in Section 7 of the Act.

We will make our employees in the meat department of stores No. 620 and 630 whole for any losses suffered by them on or after November 21, 1979, by withholding from them the same benefits as or provided to the nonmeat department employees.

WE WILL, upon request, bargain collectively with the above labor organization as the exclusive representative of our employees in the appropriate unit concerning wages, hours, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time employees employed by the Respondent at its stores located at 200 Lime Avenue (store no. 620) and 3700 Tamiami Trail (store no. 630), Sarasota, Florida; excluding all meat department employees, guards and supervisors as defined in the Act.

GREAT SCOT OF FLORIDA, INC.

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This proceeding, held pursuant to Section 10(b) of the National Labor Relations Act, as amended, herein the Act, was heard at Tampa, Florida, on March 31 and April 1, 1980. On January 10, 1980, the Regional Director for Region 12, issued an Order consolidating cases, consolidated complaint and notice of hearing based on charges filed by United Food & Commercial Workers International Union, Local 1636, AFL-CIO (herein the Union), that Great Scot of Florida, Inc. (herein Respondent), has been engaging in and is engaging in unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (herein the Act). An Order directing hearing and consolidating Cases 12-RC-5729 and 12-CA-8824 issued on December 17, 1979.

Respondent's answer denies that it has engaged in any unfair labor practices as alleged in the complaint. Briefs have been received from the General Counsel and Respondent.

Upon the entire record, from my observation, and the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Florida corporation engaged in the retail sale of groceries and allied products at its two facilities[1] located in Sarasota, Florida. Respondent is a wholly owned subsidiary of C.W.C. Corporation, Inc., an Ohio corporation with its principal office and place of business located in Findlay, Ohio. C.W.C. Corporation, Inc., also has another wholly owned subsidiary, Great Scot, Inc., another corporation with its principal office and place of business located in Findlay, Ohio. Carroll W. Cheek is the chairman of the board of directors of C.W.C. Corporation, Inc., and is the president of Respondent. The only stores operated by Respondent which are involved in this proceeding are Respondent's two stores in Sarasota, Florida. These stores opened in February 1979.

During the 7 months preceding the issuance of the Order consolidating cases, consolidated complaint, and notice of hearing, a representative period of time, the employer received gross revenues in excess of $500,000 and during that same period of time, purchased and received products valued in excess of $50,000 which were shipped directly to its Sarasota, Florida, facility to points located outside the State of Florida. Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Food & Commercial Workers International Union, Local 1636, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Union began an organizing campaign among the employees at Respondent's stores sometime prior to August 24, 1979.[2] By letter dated August 24, received by Respondent on August 27, the Union requested that Respondent recognize and bargain with it as the bargaining representative of a bargaining unit composed of all full-time and regular part-time employees employed by Respondent at its stores No. 620 and 630 located in Sarasota, Florida, excluding store managers, assistant store managers, meat department employees, casual and sea-

[1] Respondent operates two other stores in addition to the two stores involved in this proceeding and also operated one other store which was subsequently closed.

[2] All events herein occurred in 1979 unless otherwise stated.

sonal employees, guards and supervisors as defined in the Act.

Respondent, by letter dated August 27, 1979, denied the Charging Party's request for recognition, raised certain issues regarding composition and the appropriateness of the bargaining unit as described above, and suggested that the Charging Party invoke the representation procedures of the Board.

The Union filed a petition in Case 12-RC-5729 and on September 17 a hearing was held with respect to that petition and a companion case, Case 12-RC-5728, in which United Food & Commercial Workers International Union, District Union 282, AFL-CIO, had petitioned to represent a certain group of Respondent's employees working in the meat department at Respondent's stores No. 620 and 630 located in Sarasota, Florida.

On October 12, the Regional Director issued a Decision and Direction of Election involving both the Union's petition and the petition filed by District Union 282. Respondent filed a request for review of the Regional Director's decision and, on September 23, the Board denied it, except to the extent that the Board ordered that Assistant Store Manager Richard Arnold be permitted to vote a challenged ballot. The elections of both of the units found appropriate in Cases 12-RC-5728 and 12-RC-5729 were held on November 8. The Union failed to receive a majority of the votes cast in the unit found appropriate by the Regional Director in Case 12-RC-5729.[3]

On November 15, the Union filed Objections 1 through 8 to the election held in Case 12-RC-5729. The Union has withdrawn Objections 2, 3, and 6 and Objections 1, 4, 5, 7 and 8 have been consolidated with Cases 12-CA-8824 and 12-CA-8903 for hearing and decision in this proceeding.

The General Counsel's position is that the conduct prior to the election clearly is sufficient to set aside that election, and the conduct of the employer both previous to and immediately after the election is such that it would not be possible to hold a fair election among the unit employees. The General Counsel contends that a bargaining order is necessary to remedy the unfair labor practices allegedly committed by Respondent.

Respondent's position is, in effect, that the bargaining unit involved in this proceeding which excludes the meat department employees, is not an appropriate bargaining unit in view of a decision of the Board which was issued after the issuance of the decision of the Regional Director in the instant case. *Ashcraft's Market, Inc.*, 246 NLRB 471 (1979). Respondent contends that that case which supports its position that the following described bargaining unit is the *only* appropriate bargaining unit at its Sarasota, Florida, supermarkets and that the unit determinations of the Regional Director are contrary to Board precedent.

> All employees employed by the employer, Great Scot of Florida, at its Sarasota, Florida, retail stores, but excluding all office clerical employees, guards, professionals, and supervisors as defined in the Act.

Respondent contends that based on *Ashcraft's* and the evidence of record the bargaining units found by the Regional Director are not bargaining units appropriate for purposes of collective bargaining and that therefore all allegations in the complaint based on the contention that such bargaining unit is appropriate must be dismissed.[4]

In addition to denying that it has committed any unfair labor practices the Respondent contends that the record does not contain evidence of substantial unfair labor practice conduct of the type that would make the issuance of bargaining order an appropriate remedy.

On August 27, from Local 1636, there were 39 employees in the bargaining unit requested and found appropriate by the Board. Twenty-eight of those employees had signed cards authorizing the Union to represent them for collective bargaining. Employee Kathleen Susan Pack testified that in late August at store No. 620, while she was working, she was approached by Mr. Fred Weber who asked her if she or any of the other employees were having any problems with the Company, and, if so, what they were. He also told her that he felt that the employees did not need a union and that any problems they had could be discussed with him or a manager. (Fred Weber was a supervisor in that store at that time.) She testified that prior to that conversation no one from the Company had asked her if she had any problems. On cross-examination she stated that, at an all-employee meeting which was held immediately after the store opened, management went over the matters in the employee handbook "Great Scot of Florida" which provided in part as follows:

> The Employee Way
>
> If something is troubling you or if you feel you are not being treated fairly, you should express your feelings. When a group of people are closely associated in any kind of work, misunderstandings are bound to occur. If something is bothering you—if you are discouraged, worried or upset either about your work or some outside problem, you are not at your peak of efficiency. Feel free to discuss the matter with your department manager. They are sincerely interested in your welfare and will do all they can to help you. It is part of their job to assist in keeping every member of their team in top condition. If they cannot help you personally, they will be glad to recommend someone who can.

Weber testified that he did not remember whether he mentioned the word "Union" in this conversation with

[3] The tally of ballots in Case 12-RC-5728 was as follows: Approximate number of eligible voters, 5; void ballots, 0; votes cast for Petitioner, 2; votes cast against Petitioner, 2; valid votes counted, 4; challenged ballots, 1; valid votes counted plus challenged ballots, 5. The challenged ballot was sufficient to affect the results of the election. On December 17, the Regional Director issued a Supplemental Decision on Challenged Ballot, Order and Certification of Results of Election in Case 12-RC-5728.

[4] Counsel for Respondent was informed by me at the hearing that although the Board (in appropriate circumstances) may wish to reconsider its denial of review in this case because of *Ashcraft's* it was not within my province or authority to review the Board's denial of review with respect to the unit in question.

Kathleen Pack and may have used the expression "third party," not needing a third party to solve their problems. He said in using that term he was referring to a union.

Pack testified that during the time of the union campaign her store Manager, Carl Thorne, said to her that if the Union was voted in, the store would cut the working hours of employees and employees would quit.

Joeanne Auld, a former employee, testified that before any petition was filed Respondent held several meetings with its employees in which management representatives told them of Respondent's policy of encouraging employees to bring their problems to management before they became big problems. She also testified that, during August 1979, her store manager, Carl Thorne, told her that if the employees voted for the Union, the Company could not pay union wages and would either close the store or cut the hours of employees.

On August 30, Respondent sent a letter to its employees in its Sarasota, Florida, stores, the second paragraph of which advised employees that two major chains represented by the Union had closed their stores. The next paragraph referred to the success of nonunion stores while noting that "division created by strangers representing employees many times leads to the closing of stores," referring to A & P and Pantry Pride. The fourth paragraph of the letter stated, "Every person joining our Company did not have a job when they joined our Company—principally because of union store closings."

Attached to the above letter was a memo to all Sarasota employees from Fred Weber, dated August 28, subject "Unions." The third paragraph of that letter contains the following sentences: "Joining a union does not guarantee you that you will have any more job security. If you think it does, just think about all of former A & P and Pantry Pride employees, who were union members, who became unemployed, lost wages and jobs when A & P and Pantry Pride closed their operations in Sarasota."

On September 13, Respondent posted at its Sarasota store a cartoon with the title "The Great Fight Promoter." The cartoon shows a supermarket in the background, a manager and an employee and the words, "Once there were two people who worked together to build a successful business. They were pretty happy until a stranger, the union organizer (who didn't work to build anything), said to the employees, 'You poor exploited so and so! You're not getting enough from the business! Just sign this card and I'll help you make him give you more.'" That is followed by another cartoon showing the employee and the manager engaging in fisticuffs with the caption, "'Then lets you fight him,' he said happily. 'If it doesn't work out I haven't lost anything.'" It shows the union organizer carrying away a large sack full of union dues, fees, fines and assessments while the manager and the employee are shown lying prostrate on the ground. The supermarket is shown in the background with a "Closed" sign and spider webs.

On September 18, Respondent posted at its Sarasota stores a copy of an article from a publication entitled "The Market Place." The article is captioned, "Is the Bottom Falling Out of Food Stores?" Underneath the posted article is handwritten the following: "They all have one thing in common . . . a Union." The article describes the closing of many stores by A & P and Food Fair in the eastern half of the nation.

On September 19, Respondent mailed letters to its Sarasota store employees, the last paragraphs of which read: "The Union is saying that you must stick together and not let the Company divide you. Actually, they are the ones attempting to divide us by petitioning for elections." They, they go on to say, "How can you lose? Why not ask thousands of former employees who are out of work because of closed stores; and what about all those former employees in the Sarasota area? Over 5,000 union stores closed and at least 170,000 union members have lost their jobs. Could that be the reason they are so interested in you? They need more members to support their salaries and expense accounts."

On September 21, Respondent passed out a document in a question-and-answer format to its Sarasota employees. Among the questions asked is the following:

> Q. Can the Union force Mr. Cheek to keep our stores open here in Sarasota?
>
> A. Of course not. Remember, the only supermarkets in Sarasota that were unionized are now closed. The only people who can guarantee this are the customers. The union organizers may be talking about the fact that they will resist any decrease in operations. The Union simply can't guarantee this! As we all know, keeping work depends upon keeping customers satisfied with quality products and service. This is the only guarantee that you will continue to have good work and job security.

On September 29, Respondent posted a notice at its Sarasota stores with the title "Hot Line Questions." It reads as follows:

> Q. The Union has been telling us they can force you to keep both stores open, you can't close them even if you wanted to. Is that true?
>
> A. That is just another ridiculous statement the union organizers are making. Any company has the right to close their stores for any reason. Why, even the Union has admitted A & P and Pantry Pride closed unprofitable stores in our area. That is the key, unprofitable; any time a business cannot make a profit, it becomes economically impossible to remain in business. During the past several years over 5,500 *Union* (the emphasis is contained in the document) stores have closed down, many in our area. Obviously, they were unprofitable, but they all had one thing in common . . . the Union. You decide what causes the store closings. How many nonunion stores have closed in our area? Ask the union organizers what happened to all those employees. What kind of job security did they have?

Robert Morse, an employee of a labor relations consulting firm, provided labor relations consulting services for Respondent and met with Respondent's employees concerning the union organizing campaign. Morse presided at meetings held on September 4 with the employees at each Sarasota store, and spoke to them concerning

the union campaign. Employees Kathleen Pack, Gina Capelli, and Joeanne Auld testified that Morse told them that Pantry Pride and A & P stores were union and had closed. Morse testified that he told the employees at the meeting what was happening in the supermarket industry and explained about union markets closing, the number of union stores closing, how Pantry Pride and A & P had closed many stores, and that many other union stores had closed. He then discussed the percentage of employees who were union members and talked about the number of successful nonunion companies, including retail stores in the Sarasota area which were in business and were nonunion.

Respondent sent to its employees at the Sarasota stores the following letter dated November 21:[5]

> It is our company policy to maintain an equitable and competitive position in the marketplace; therefore, we are making the following improvements in our compensation program for our employees. The election by our non-meat department employees conclusively affirmed our position that these employees are capable of representing themselves, although the meat department is still in controversy.
>
> We hope to end the era of divisiveness and expect our collective efforts to bring our stores to a profitable basis so we may justify continuing our operations in Sarasota. We appreciate your support and cooperation.
>
> Effective immediately, November 21, 1979, time-and-one-half will be paid to all employees, excluding the meat department, who are scheduled and working on the following holidays: (The exclusion of the meat department is directed to us by the N.L.R.B. until the controversy in that department is resolved.)
>
> New Years Day, Memorial Day, July 4th, and Labor Day.
>
> Should any of our stores be open on Christmas, Easter, or Thanksgiving, the employees working those holidays will also receive time-and-one-half their regular wage rate.
>
> Every non-meat employee has been reviewed by our Salary Committee, and those employees receiving merit raises will be notified of their increase in wages individually. The wage increase shall become effective on December 7, 1979.
>
> Another additional change we wish to announce is that all employees scheduled and working on Sunday, excluding the meat department, shall be paid at time-and-one-half their regular rate of pay for any hours worked on Sunday between 12:01 a.m. and 11:59 p.m. This policy we feel is necessary and equitable to attract grocery department employees, as we are competing with many other seasonal employers for personnel at this season of the year.
>
> A very heartfelt "Thank You" is extended to each and every one of you for your cooperation and loyal support during the recent challenges made toward you and our company. Only through your continued dedication and loyal support can our company continue to grow and offer future opportunities for all our employees.
>
> Very truly yours,
> GREAT SCOT OF FLORIDA, INC.
> Carroll W. Cheek
> President

On December 7, 22 of the 32 employees whose votes were counted in the election among the nonmeat department employees received pay raises. Two of those voters had resigned from the company before December 7.[6]

Discussion and Conclusions

As previously stated the Regional Director in Case 12-RC-5729 found that all full-time and regular part-time employees employed by Respondent at its two stores in Sarasota, Florida, excluding meat department employees, guards, and supervisors constituted a unit appropriate for collective bargaining. The Board denied Respondent's request for review except with regard to the status of one individual, and thereby approved the Regional Director's decision. Accordingly, since it is the decision of the Board that the unit requested by Local 1636 is appropriate for collective bargaining, I have no alternative but to find the same.

The parties to this proceeding have stipulated that at the time Respondent denied the request for recognition there were 39 employees in that unit. The evidence shows, and I find, that 28 of those employees had signed union authorization cards and that such cards are valid. Accordingly, when Respondent denied the Union's request for recognition, a substantial majority of the unit employees had authorized the Union to represent them for the purpose of collective bargaining.

The alleged solicitation of grievances

There is no dispute that Fred Weber asked Kathleen Pack whether she or any other employee had had any problems with the Company. Although there is also no dispute that Respondent had a policy of encouraging employees to bring their questions and dissatisfactions to management, there is no evidence that Respondent's policy included management's solicitation of grievances from employees. The fact that Weber coupled his solicitation of Kathleen Pack's grievances with the statement that the employees did not need a union and could bring their problems to management raises the reasonable infer-

[5] At the time this letter was issued the election among the meat department employees resulted in a tie vote with 1 challenged ballot being determinative, while in the other bargaining unit, Local 1636 had filed objections to that election on November 15.

[6] Respondent has a merit review policy. Store managers review the performance of their employees and submit their reviews to a salary committee. That committee considers the reviews and gives discretionary pay raises. During the period between the filing of petitions and the elections herein, the committee did not consider merit pay raises because they were discretionary. After the elections were held, the committee granted merit pay increases. The committee did not consider merit pay increases for meat department employees because their election had not been determinative.

ence that management is promising the employees that it will resolve their grievances and that union representation is unnecessary. In the circumstances, I find that such is a violation of Section 8(a)(1) of the Act. *Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

Alleged threat that employees' hours would be cut

Kathleen Pack and Joeanne Auld testified that during the Union's campaign Carl Thorne, store manager, told them that if the employees voted for the Union their working hours would be cut. I find such a statement to be a threat and an interference with the employees' Section 7 rights and accordingly a violation of Section 8(a)(1) of the Act.

The alleged threats to close the stores

The Supreme Court case, *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), established certain standards for determining whether an employer's statements about the effects of unionization are permissible. The Court stated that any evaluation of employer's statements, "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[7]

The Court further stated that:

> . . . an employer is free to communicate to employees any of his general views about unionization or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probable consequences beyond his control and to convey a management decision already arrived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion and as such without the protection of the First Amendment.[8]

Judged by those standards Respondent's campaign literature and the speech of Robert Morse to the employees on September 4, that stores that were union were being closed and the employees were out of jobs, both nationwide and in Sarasota, Florida, area (referring often to the closing of Pantry Pride and A & P stores) and noting the success of nonunion operations, contains an implication that Respondent may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him and therefore the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion and as such without the protection of the first amendment as referred to above in *Gissel*. The employer's campaign against the Union definitely gave the impression that the election of the Union would cause the plant to be closed, in the circumstances of Respondent not presenting any evidence to support its prediction of closing if the Union won the election and made unreasonable demands or demands that Respondent could not afford, were unlawful. There is no support for Respondent's assumption that the Union, which had not up to that point presented any demands, except recognition, would present demands that were unreasonable or which Respondent could not meet. Respondent presented no facts in regard to what kind of a wage or other demand it considered reasonable or as to what economic concessions it could afford to make. Respondent clearly created the impression that it would make a judgment unilaterally on the reasonableness of the Union's demands on the basis of undisclosed facts and having so decided, closing would inevitably follow.

Moreover, the statements do not contain a management decision already arrived at to close the plant in the event of unionization, but contained threats to make that decision after the employees had voted in the election and even before collective bargaining ever got started. The statements of Respondent were "a misrepresentation designed to deceive the employees, and not a carefully phrased prediction based on objective facts of how unionization would result in a plant closure."[9]

I therefore conclude that Respondent, by Morse's statements and by the literature referred to above about closing the stores, violated Section 8(a)(1) of the Act.[10]

The granting and withholding of benefits

As previously stated Respondent sent a letter to employees dated November 21 in which it thanked the employees for voting against the union representation and announced that it was making a change to pay its nonmeat department employees time-and-one-half for work performed on Sunday and certain holidays and that it was recommencing its program of granting merit wage increases for employees. In that same letter Respondent did not make such changes for its meat department employees, indicating that it could not because of the National Labor Relations Board.

Respondent now contends that its representatives were confused by advice which had been given by its advisors on that subject and that the letter it sent to its employees on January 10, 1980, admitted its confusion and ex-

[7] *Gissel, supra* at 616.

[8] *Id.* at 618.

[9] *Jimmy-Richard Co., Inc.*, 210 NLRB 802, 805 (1974).

[10] Having concluded that Respondent's message constitutes a prediction that selection of the Union would result in Respondent's closing the Sarasota stores for economic reasons, I do not consider Respondent's November 5, 1979, letter to employees as having removed that prediction. That letter was distributed only 3 days before the election and accordingly I cannot conclude that it constituted a reversal of Respondent's continuing message that selection of the Union would result in closing the Sarasota stores.

plained to all employees that it had totally misunderstood the information it had received from its attorneys and others who counseled him in those matters; that he was under the impression that no matter what changes were made in the nonmeat department he was prohibited from making any change whatsoever in wages or benefits involving meat department personnel until the labor matter was settled. In the letter of January 10, 1980, Respondent announced that wage adjustments announced on November 21 for nonmeat department personnel would also be adjusted for meat department personnel and that the improvements would be effective retroactive back to December 7, the same date used for the other employees. That letter also extended the merit wage program benefits to its meat department employees.

Respondent claims that Cheek's letter of January 10 totally explained what occurred and totally dissipated any improper conclusion that might have been made from the mistake which Respondent made. In addition, the meat department employees did receive merit reviews and appropriate merit increases retroactive to December 7, 1979. Although Respondent claims that there is not a scintilla of evidence which indicates or establishes that Respondent's actions in this regard were to "reward" the employees in one unit and "punish" the employees in the other unit, I do believe that Respondent's actions whether intentional or unintentional or by mistake or design or indeed bad advice, did create the impression that it was "rewarding" the nonmeat department employees who voted against the Union and "punishing" the meat department employees who did not vote against the Union.

Although the letter of January 10 was an attempt by Respondent to remedy its violation of the Act, it did not succeed in removing the initial impression conveyed by its letter of November 21, and the followup increases to its nonmeat department employees that they indeed were being thanked and rewarded for voting against the Union at a time when Respondent was aware that the Union had filed objections to the election filed in Case 12-RC-5729 and therefore had knowledge that employees in that unit might possibly vote again concerning union representation.

I agree with the General Counsel that the letter dated November 21, and the actions taken by Respondent as noted in that letter, violated Section 8(a)(1) and (3) of the Act and that a misunderstanding of the law is not a defense to conduct which clearly is a violation of the Act. *The Great A & P Tea Company*, 166 NLRB 27 (1967).

In *The Great A & P Tea Company* case, the respondent sent a letter to its employees announcing and granting holiday benefits to unorganized employees and, at the same time, withheld such benefits from employees about to vote on union representation. That letter told the employees that but for the union they too would have received an additional holiday. It also had an additional comment as follows: "We are . . . just as tired of this union business, as we are sure you are and we regret that we are unable to give you this additional holiday."

The Board held that the additional gratuitous comment, "illustrated that the letter was more than a mere informational notice but was intended to exploit and bring home to the employees that the Union was responsible for their being deprived additional benefits." The Board concluded that the respondent's letter announcing its withholding of benefits as well as its actual withholding of such benefits and its exploitation of such action was a tactical maneuver designed to discriminate against employees and to interfere with the employees' freedom of choice in violation of Section 8(a)(3) and (1) of the Act.

The Board found further that, "in the context presented, the discriminatory treatment of employees was violative of Section 8(a)(1) and (3) whether or not there is proof that Respondent was motivated by an unlawful purpose as it was 'inherently destructive of employee interests,' and no persuasive evidence of a legitimate purpose appears therefor." *The Great A & P Tea Company, supra* at 29.

The refusal to bargain

As previously stated the Union requested to be recognized as a collective-bargaining representative of employees in a bargaining unit found appropriate by the Board and at the time of that request a substantial majority of employees in that unit had designated the Union as their collective-bargaining representative. Respondent refused recognition and the Union filed a petition, Case 12-RC-5729, seeking an election in the unit for which it had requested recognition. The Union failed to receive the majority of the votes cast in that election and filed objections to the election.

There remains before us the question of whether under *N.L.R.B.* v. *Gissel Packing Co., supra*, a bargaining order is an appropriate remedy for the 8(a)(5) refusal to bargain. As in *Gissel* the employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined the Union's majority requiring the election to be set aside. I consider the bargaining order an appropriate remedy for the unfair labor practices because they are "such a nature that their coercive defects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *N.L.R.B.* v. *Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967); see also *N.L.R.B.* v. *Heck's Inc.*, 398 F.2d 337, 338 (4th Cir. 1968). The Board has held that a threat to close business and put the employees out of their jobs is conduct which prevents a fair election and requires a bargaining order. *Guardian Ambulance Service*, 228 NLRB 1127 (1977); *C & T Manufacturing Company*, 233 NLRB 1430 (1977).

The granting of overtime pay and pay raises after the election coupled with thanks to employees for voting against the Union is conduct which prevents the holding of a fair rerun election. Employees, who have received benefits after voting against the Union with a message thanking them for their votes, would certainly be hesitant in voting for a union with knowledge that another group of employees who did not vote against another union were being denied those same benefits.

The Union requested recognition in an appropriate bargaining unit in which it had authorization cards from a majority of the unit employees. Inasmuch as Respondent's unlawful conduct has apparently destroyed the Union's majority status and thus prevented the holding of a fair second election, I agree with the General Counsel that the remedy in these cases must include the setting aside of an election held in Case 12-RC-5729 and ordering that Respondent recognize and bargain with the Union as the representative of its employees in the bargaining unit found appropriate in Case 12-RC-5729.

Respondent's meat department employees at its Sarasota, Florida, stores were not given the same benefits as were given the nonmeat department employees because a majority of them had not voted against a union. As previously indicated, regardless of the reasons for Respondent's actions, that conduct is discrimination within the meaning of Section 8(a)(1) and (3) of the Act and the remedy will include an order to make whole the meat department employees for any loss of wages, including overtime pay, they may have suffered as a result of such discrimination.

Upon the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom; that it make the meat department employees whole for the loss they have sustained as a consequence of the unlawful conduct by granting benefits to the other employees and not to the meat department employees with interest computed as set forth in *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). I shall also recommend that, upon request, Respondent bargain collectively with the above-named labor organization as the exclusive representative of the employees in the appropriate unit concerning wages, hours, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

1. Great Scot of Florida, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers International Union, Local 1636, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating an employee about the employees' complaints and advising that the employees bring their complaints directly to management, without need of a union; by telling an employee that if the Union became the employees' collective-bargaining representative Respondent would cut the working hours of its employees; by interrogating an employee about the employees' attendance at a union meeting; and by threatening to close its stores No. 620 and 630 if its employees selected the Union as their bargaining representative through employee meetings, and correspondence, and posting of notices, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By granting employees at its stores No. 620 and 630 except for meat department employees time-and-one-half for working on certain holidays and Sunday; by giving pay raises to employees at its stores No. 620 and 630, except for meat department employees, because a majority of its employees in the bargaining unit described below had voted against the Union in an election held by the Board, Respondent has engaged in conduct precluding the holding of a fair rerun election among the employees in the unit described below, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. All full-time and regular part-time employees employed by the Respondent at its stores located at 200 Lime Avenue, store No. 620 and 3700 Tamiami Trail (store No. 630) Sarasota, Florida; excluding all meat department employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for collective bargaining.

6. Since August 24, 1979, the Union by virtue of Section 9(a) of the Act has been and is the exclusive representative of employees in the unit described above for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

7. Since August 27, 1979, Respondent has failed and refused and continues to fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit described above.

8. By the acts and conduct described in paragraph 7 above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

9. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5), and Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Great Scot of Florida, Inc., Sarasota, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities and desires.

(b) Interrogating employees about complaints and advising employees to bring their complaints directly to management without need of a union.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Threatening to cut the working hours of its employees if the Union became the employees' collective-bargaining representative.

(d) Threatening or impliedly threatening to close its stores No. 620 and 630 if employees selected the Union as their collective-bargaining representative.

(e) Granting employees in stores No. 620 and 630, except for meat department employees, time-and-one-half pay for working on certain holidays and giving said employees pay raises because a majority of those employees voted against the Union in a Board-conducted election.

(f) Withholding benefits described above from its meat department employees at said stores because the majority of employees have not voted against United Food & Commercial Workers International Union, District 282, in a Board-conducted election.

(g) Refusing to bargain collectively with United Food & Commercial Workers International Union, Local 1636, AFL-CIO, as the exclusive bargaining representative of its employees in the appropriate unit.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make its employees in the meat departments of stores No. 620 and 630, whole, in the manner described in the portion of this decision entitled, "The Remedy," for any losses suffered on or after November 21, 1979, by virtue of the withholding of time-and-one-half pay for working on certain holidays and Sunday, and pay raises given to its nonmeat department employees on December 7, 1979.

(b) Upon request, bargain collectively with the above labor organization as the exclusive representative of employees in the appropriate unit concerning wages, hours, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its stores in Sarasota, Florida, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that copies of said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

3. The election held on November 8, 1979, in Case 12-RC-5729 is set aside.

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to A Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."